

2014 WL 3002074 (C.D.Cal.) (Trial Motion, Memorandum and Affidavit)
United States District Court, C.D. California.

Karen LEITNER, Plaintiff,

v.

SADHANA TEMPLE OF NEW YORK, INC., a New York corporation; Kunwar
Surendra Kumar; Sarah Carson; Naomi Aschner; Barbara Thompson, Defendants.

No. 13-cv-07902-MMM(Ex).
May 27, 2014.

**Plaintiff's Opposition to Defendants' Motion to Dismiss Second Amended
Complaint; Memorandum of Points and Authorities in Support Thereof**

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[Declaration of Katherine Domenico filed concurrently herewith]

Action filed: October 25, 2013

Date: June 16, 2014

Time: 10:00 a.m.

Courtroom: 780

TO ALL PARTIES AND TO THEIR ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE THAT Plaintiff, KAREN LEITNER, pursuant to [Federal Rules of Civil Procedure, Rule 12\(b\)\(6\)](#), files this Opposition to Defendants Sadhana Temple of New York, Inc. ("Sadhana Temple"), Naomi Aschner, Sarah Carson, Barbara Thomson and Kunwar Surendra Kumar ("Defendants") Motion To Dismiss First Amended Complaint and Opposition To The Motion For Leave To File A Second Amended Complaint, considered by the Court in tandem as a Motion To Dismiss Plaintiff's Second Amended Complaint ("Motion"), according to the Order of the Court of May 8, 2014, and Defendants' Notice in response thereto filed on May 16, 2014.

Plaintiff asserts that the facts plead are sufficient to allow the claims for: (1) promissory estoppel; (2) unjust enrichment; (3) constructive fraud; (4) fraud; (5) breach of fiduciary duty; (6) conversion; (7) **financial elder abuse**; (8) intentional infliction of emotional distress; (9) involuntary dissolution of joint venture; and (10) accounting. This Opposition is supported by Memorandum of Points and Authorities, oral argument, and the court file pertaining to this matter. Plaintiff asks the Court to deny Defendants' motion.

Respectfully submitted.

DATED: May 27, 2014

Law Office of Richard M. Foster

By: <<signature>>

Richard M. Foster, Esq.

Katherine Domenico, Esq.

Attorneys for Plaintiff

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MEMORANDUM OF POINTS AND AUTHORITIES

I.

DEFENDANTS' MOTION MUST BE DENIED FOR FAILURE TO COMPLY WITH RULE 7-3

Defendants have failed to comply with the Local Rule 7-3, which mandates as follows:

In all cases not listed as exempt in L.R. 16-12, and except in connection with discovery motions (which are governed by L.R. 37-1 through 37-4) and applications for temporary restraining orders or preliminary injunctions, counsel contemplating the filing of any motion shall first contact opposing counsel to discuss thoroughly, preferably in person, the substance of the contemplated motion and any potential resolution. If the proposed motion is one which under the F.R.Civ.P. must be filed within a specified period of time (e.g., a motion to dismiss pursuant to [F.R.Civ.P. 12\(b\)](#), or a new trial motion pursuant to [F.R.Civ.P. 59\(a\)](#)), then this conference shall take place at least five (5) days prior to the last day for filing the motion; otherwise, the conference shall take place at least ten (10) days prior to the filing of the motion. CA CD L.R. 7-3.

Plaintiff's counsel attempted, although unsuccessfully, to participate in a meaningful meet and confer process required by Local Rule 7-3 on defendants' Motion to Dismiss First Amended Complaint and to address the purported deficiencies of the then-proposed Second Amended Complaint during the parties' meeting on various discovery issues held on April 7, 2014, as described more fully in the Declaration of Katherine Domenico filed concurrently herewith. Defendants' counsel refused, however, pointing to the Motion to Dismiss that had been already filed with the court on February 19, 2014, that is essentially identical to the operative Motion to Dismiss filed by Defendants on April 14, 2014. Defendants' counsel also referred to a case, which he could not cite at the time, purportedly in support of defendants' position. When asked to provide the citation and the analysis in writing, defendants' counsel refused and again pointed to the Motions on file at the time.

Likewise, defendants' counsel refused to address the purported deficiencies of the proposed Second Amended Complaint claiming that it was not necessary because it was not the operative pleading. All further attempts to discuss any potential resolution of the alleged deficiencies were met with a refusal. In fact, Defendants' counsel commented that Defendants were not required to point out defects in Plaintiff's complaint so Plaintiff could correct them.

No discussion of the substance of the contemplated motion and any potential resolution mandated by Rule 7-3 took place prior to Defendants' filing of their motion on April 14th. The motion, therefore, must be denied.

II.

INTRODUCTION AND FACTUAL BACKGROUND

Notwithstanding the procedural deficiencies of Defendants' Motion, and only if the Court wishes to consider the Motion despite them, Plaintiff submits the following argument in opposition.

Defendants' motion must be denied because Plaintiff's Second Amended Complaint ("SAC") passes the standards for dismissal set forth in [Rule 12\(b\)\(6\)](#). SAC alleges ten (10) claims, all supported by well-pleaded factual allegations (not mere legal conclusions), and all plausibly suggestive of a claim. Although Defendants would like to see all ten causes of actions dismissed because they purportedly are either/or: 1) time-barred, 2) lack merit, 3) insufficiently plead, SAC was pleaded with sufficient particularity to withstand all three challenges.

Defendants' contention that Plaintiff's claims are time-barred by the statute of limitations is flawed. They would like to persuade the Court that because Plaintiff left the Family in 2003, she should have known that she would not receive her share of the Family's pooled assets. Plaintiff's leaving the Family, however, has no bearing on her interest in the Family investment, and she had been continuously reassured, even after leaving, that her share of the investment would be distributed to her upon her reaching retirement age in 2012. The SAC alleges that Defendants promised Plaintiff in 2003 that she would be given her equal share of resources when she reached her retirement age. (SAC, ¶1). Upon reaching her retirement age in 2012, Plaintiff requested from Defendants her equal share of the pooled resources and the monies owed to her. *Id.* Defendants, however, though not refusing, have yet to give Plaintiff her share of the accumulated assets as promised. *Id.* It is apparent that 2012 is the earliest point in time when Plaintiff's claims began to accrue. Defendants' contention that Plaintiff's claims are barred by the statute of limitations, therefore, is entirely unfounded and should not be given any consideration.

Defendants' assertions that Plaintiff's claims lack merit and are substantively insufficient are misplaced. Defendants seem to confuse the liberal pleading rules that allow the assertion of evidentiary unsupported claims at the pleading stage with the summary judgment motion standard of affirmatively coming forward with sufficient evidence for the claims to create a genuine issue at trial. As will be discussed below, Plaintiff has pleaded sufficient facts to state a claim upon which relief can be granted, and all the stated claims are plausible on their face.

While Defendants may dispute the claims alleged, it does not follow that their [Rule 12\(b\)\(6\)](#) motion has merit. Accordingly, Plaintiff respectfully requests that this Court deny Defendants' Motion to Dismiss as Plaintiff's lawsuit is well substantiated and supported by the well-pleaded allegations sufficient to withstand Defendants' challenge at this state in the case.

III.

LEGAL STANDARD

In appraising the sufficiency of a complaint, the accepted rule is that the complaint must provide enough facts to state a claim for relief that is plausible on its face. [Ashcroft v. Iqbal](#), (2009) 556 U.S. 662, 678; [Bell Atl. Corp. v. Twombly](#), (2007) 550 U.S. 544, 570. A heightened fact pleading of specifics are not required. *Id.* "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged. The plausibility standard is not akin to a 'probability requirement', but it asks for more than a sheer possibility that a defendant has acted unlawfully." *Ashcroft* at 678. "A plaintiff is not required to set out in detail the facts upon which he bases his claim...only a short and plain statement...is required." [Dioguardi v. Durning](#), 139 F.2d 774 (2nd. Cir. 1944).

The Court must accept as true the allegations of the complaint in question and any reasonable inferences that may be drawn from them in deciding a motion to dismiss. [Hospital Bldg. Co. v. Rex Hospital Trustees](#), (1976) 425 U.S. 738, 740; [Parks School of Business, Inc. v. Symington](#), 51 F. 3d 1480, 1484 (9th Cir. 1995). The Court must further construe the pleadings in the light most favorable to the opposing party, here Plaintiff, and resolve all doubts in the pleader's favor. [Jenkins v. McKeithen](#), 395 U.S. 411, 421, reh'g denied, 396 U.S. 869 (1969).

Plaintiff maintains that she provided sufficient facts and information to state claims for relief that are plausible on their face, as will be discussed below, and Plaintiff respectfully requests that this Court deny Defendants' motion in its entirety.

IV.

PLAINTIFF'S CLAIMS ARE NOT TIME-BARRED

A. Plaintiff's Claims Are Not Barred By the Statute of Limitations as the Statute Began to Toll in 2012

Plaintiff's claims began to accrue in 2012 when Plaintiff reached the age of retirement--the age Defendants told Plaintiff she would become entitled to receive her share of the accumulated pooled assets. Defendants contend that Plaintiff's claims began to accrue in 2003, representing the year she left the Family. Such contention is unfounded, since Plaintiff's leaving the Family had nothing to do with the date upon which she could claim her retirement. Even when she asked for an advance from her retirement share at the time of her departure to help her get settled, she was again told by Defendants that she would have to wait until she reached her retirement age to receive her share.

The SAC clearly alleges that "Plaintiff was promised her share of the accumulated assets repeatedly throughout the joint venture and based thereon she gave all she had to the joint venture. Plaintiff was not given her share at the time she left **but was told at that time she would be given her equal share upon her reaching her retirement.**" Emphasis Added; (SAC, ¶1). Furthermore, the SAC alleges that "Upon reaching her retirement, **Plaintiff demanded her equal share on November 27, 2012**, however, Defendants, although not refusing to provide her equal share, have not provided same despite repeated requests nor given an accounting." Emphasis Added; (SAC, ¶1). Accordingly, it is clear that the earliest Plaintiff's claims began to accrue was in November 2012 when she requested from Defendants her equal share of the assets.

In fact, because Defendants are yet to expressly refuse to release Plaintiff's share of the accumulated assets, it can be argued that the statute of limitations began to accrue even later than November 2012. At the earliest, however, the claims accrued in November 2012. As such, Plaintiff's claims are not barred by the statute of limitations.

1. Plaintiff's claim for promissory estoppels is not time-barred

In California, a promissory estoppel claim has a two-year statute of limitations. See [Cal. Civ. Proc. §339\(1\)](#). And the limitations period begins to run when the last element essential for the cause of action occurs. [Howard Jarvis Taxpayers Ass'n v. City of La Habra, \(2001\) 25 Cal. 4th 809](#). Defendants inaccurately contend that the promissory estoppels claim began to accrue when Plaintiff left the Family in 2003. As discussed more thoroughly above Plaintiff was informed that she would receive her share of the accumulated sums upon the time she reaches her retirement. And in November 2012, when Plaintiff reached retirement, she demanded from Defendants the monies owed to her. As such, Plaintiff's claim is well within the two-year limitation period.

2. Plaintiff's claim for unjust enrichment is not time-barred

The statutory period for an unjust enrichment claim is three-years in California. [Federal Deposit Ins. Corp. v. Dintino, \(2008\) 167 Cal. App. 4th 333, 348](#). Although Plaintiff asked for her share from Defendants first in 2003, Defendants informed her that they would give her an equal share upon retirement at the age of sixty-five. This apparently was because that would allow the pooled resources (including Plaintiff's share) to continue to accrue income until her age of retirement. Therefore, Plaintiff waited and requested her equal share when she reached the age of retirement in 2012, as instructed. As this lawsuit was filed in 2013, Plaintiff's claim for unjust enrichment is not time-barred.

3. Plaintiff's claim for fraud is not time-barred

A claim for fraud must be brought within three years. [Cal. Civ. Proc. §338\(d\)](#). Because Plaintiff's action was filed in 2013, her claim for fraud was brought within the three-year statutory period and is not time-barred, contrary to Defendants' assertion.

4. Plaintiff's claim for breach of fiduciary duty is not time-barred

A breach of fiduciary duty claim has a three-year statute of limitations period if the complaint alleges fraud on the part of Defendants. [City of Vista v. Robert Thomas Securities, Inc., \(2000\) 84 Cal. App. 4th 882, 889](#). As such, Plaintiff's claim for breach of fiduciary duty is not time-barred.

Defendants did not deny Plaintiff's claim when at the age of retirement Plaintiff requested her equal share. Instead, Defendants stalled and requested her to provide additional documentation. If Defendants had denied Plaintiff her equal share in 2003, why would Defendants entertain her request at the time of her retirement in 2012? Defendants promised Plaintiff her equal share throughout her years with the family and after she left payable when she retired in order to get Plaintiff to sign over the bank accounts in her name and quitclaim the real property in her name in 2003 when she left. Plaintiff is now entitled to her retirement funds, as is clearly set forth in her SAC.

5. Plaintiff's claim for constructive fraud is not time-barred

A claim for constructive fraud, similar to a claim for fraud, is subject to the three-year statute of limitations. [Day v. Greene, \(1963\) 59 Cal. 3d 404, 411](#). Although Plaintiff may have severed her ties with the Family in 2003, her claim for constructive fraud began to accrue in 2012, the year Defendants promised they would pay Plaintiff the monies owed.

6. Plaintiff's claim for conversion is not time-barred

A claim for conversion has a three-year statute of limitations period in California. See [Cal. Civ. Proc. §338\(c\)](#). And a conversion claim begins to accrue at the time a defendant interferes with or wrongfully takes the personal property of the plaintiff. See

AmerUS Life Ins. Co. v. Bank of America, N.A., (2006)143 Cal. App. 4th 631, 639. Because Defendants informed Plaintiff that she would be entitled to her share of the accumulated assets upon her retirement age in 2012, the conversion claim began to accrue at that time given that Defendants only then intentionally interfered with Plaintiff's property. As such, the conversion claim is not time-barred.

7. Plaintiff's claim for financial elder abuse is not time-barred

California Welfare and Institutions Code section 15657.7 establishes a four-year statute of limitations period for a financial elder abuse claim. The four year period begins to accrue once the plaintiff discovers or has reason to discover the facts that would constitute the abuse. *Cal. Welf. & Inst. Code* §15657.7.

Plaintiff had no reason to believe in 2003 that Defendants would not pay her an equal share of the assets as Defendants, at that time, again promised payment once Plaintiff reached her retirement age and had Plaintiff execute the documents necessary to transfer the bank accounts and real property held in Plaintiff's name. In November 2012, upon reaching her retirement Plaintiff, as instructed, asked Defendants for her equal share of the Family's accumulated assets. In fact, even at the time of the filing of this lawsuit, Defendants had not expressly refused to pay Plaintiff her equal share. In other words, Defendants never refused to pay Plaintiff but rather strung her along, knowing her vulnerable mental and emotional state, hoping to delay her further in seeking legal relief. It was not until 2012 that the applicable statute of limitations began to accrue as it was only in 2012 that Plaintiff could have reasonably discovered the facts constituting the financial abuse on the part of Defendants.

8. Plaintiff's claim for IIED is not time barred

A claim for intentional infliction of emotional distress, ("IIED") is subject to a one-year statute of limitations. *Cal. Civ. Proc.* §340(3). The continuing tort doctrine, however, dictates that allegations of several instances of abuse tolls the statutory period until the last act of abuse. *Pugliese v. Super. Ct.*, (2007) 145 Cal. App. 4th 1444; *DeRose v. Carswell*, (1987) 196 Cal. App. 3d 1011, 1017.

Defendants contend that the alleged abuse by Defendants on Plaintiff ended in 2003, when she left the Family and thus argue that the statute of limitations bars Plaintiff from recovering on her IIED claim. Defendant, however, clearly ignores the allegations listed in the SAC as the SAC unequivocally alleges that Plaintiff continued to suffer abuse and harm at the hands of Defendants even after she left in 2003. (SAC, ¶¶130; 132-134). The SAC specifically alleges that Defendants' outrageous conduct includes "their refusal to give Leitner her retirement and inheritance money, and all monies rightfully owed to her, by enforcing a dominion control of her account, whereby positions Defendants in a position to obtain complete control and power over Plaintiff's interest." (SAC, ¶130). As such, Defendants' abuse continued well after Plaintiff left the Family in 2003. At the earliest, therefore, the statute accrued in November 2012 and Plaintiff filed suit eleven months thereafter in October 2013 meeting the one year statute.

Furthermore, Defendants still refuse to give Plaintiff the money she is owed so as to prevent her from moving forward with her life. Defendants continue to engage in abusive conduct by taking advantage of Plaintiff's susceptible and vulnerable physical, mental, and emotional state. (SAC, ¶¶131-132). Therefore, Plaintiff's IIED claim is not barred by the statute of limitations as Defendants currently are engaging in abusive conduct. Defendants' assertion that the last act of abuse ended in 2003 when Plaintiff left the Family is utterly false and simply ignores the outrageous and abusive conduct that Defendants continue to employ.

9. Plaintiff's dissolution of joint venture claim is not time-barred

Pursuant to *California Corporations Code* section 16406, the accrual of a statutory limitation on a right of action for a partner's claim to seek dissolution of a partnership is "governed by other law." In *Manok v. Fishman*, the court applied a four-year statute

of limitations to dissolution of joint venture claim. (1973) 31 Cal. App. 3d 208, 213. The court in *Manok* further held that a partner's right to bring an action to recover a share of the partnership assets accrues at the time the partner severs his/her ties with the partnership. *Id.* at 211. Although Plaintiff left the Family in 2003, she did not dissociate herself from the partnership and joint venture until 2012, at the earliest, when she was promised but had not received the monies Defendants promised. As such, the claim began to accrue in 2012.

10. Plaintiff's claim for accounting is not time-barred

Pursuant to *California Code of Civil Procedure* section 343, an action for an accounting has a four-year statute of limitations. Plaintiff had a right to seek an accounting of the partnership at the time the partners excluded her from the partnership activities as well as at the time Plaintiff abandoned the partnership. *Manok*, 31 Cal. App. at 211; *Estate of Fincher*, (1981) 119 Cal. App. 3d 343, 347-49. As discussed above, although Plaintiff left the family in 2003, it was not until 2012 that she truly disassociated herself from the Family as she was still expecting Defendants to act upon their promise that she would be paid her share of the accumulated monies at the time of her retirement. As such, Plaintiff appropriately brought her claim for accounting within the four-year statutory period.

B. Defendants Are Estopped From Asserting a Statute of Limitations Defense

Although Plaintiff's claims are not barred by the statute of limitations, assuming arguendo that the claims are barred, Defendants are estopped from raising the defense because they are directly responsible for causing Plaintiff's trauma, which delayed her ability and capacity to file the lawsuit until now and only after seeking medical treatment and care.

After Defendants filed their motion, Plaintiff was contacted by a former Family member who became aware of the lawsuit through the internet. This former Family member witnessed firsthand Defendants' **abusive** conduct as he too was a subject of Defendant Kumar's violent outbursts. Defendant Kumar repeatedly beat this former Family member and at one time **dislocated his jaw**. He further independently confirmed Plaintiff's allegations explaining how Defendant Kumar would rape the women and beat his students using his fists, a walking cane, a baseball bat, a gong mallet, and a cattle prod. He further witnessed Plaintiff with her black and blue face after she was beaten by Defendants. As such, Plaintiff has suffered severe anguish, which has been independently confirmed through a third party and a former member of the Family.

Plaintiff has sought medical help and attention to address her trauma and has only recently been able to pursue this lawsuit against Defendants. Therefore, even if the statute of limitations barred Plaintiff's claims against Defendants, Defendants are estopped from asserting the defense as their conduct alone caused Plaintiff severe mental and emotional anguish which delayed her in pursuing legal action.

Additionally, Defendants must be further precluded from asserting a statute of limitations defense because even up until the filing of the instant suit, Defendants had not refused or denied that Plaintiff was entitled to her equal share in the Family's accumulated assets. Defendants intentionally strung Plaintiff along into believing they would release her retirement funds to her. Accordingly, Defendants' conduct must bar them from raising the defense of statute of limitations.

V.

THE SAC ALLEGES SUFFICIENT FACTS THAT ESTABLISH CLAIMS THAT ARE PLAUSIBLE ON THEIR FACE

A. Plaintiff's SAC Alleges Sufficient Facts to State a Claim for Promissory Estoppel

Four elements are required to establish a claim for promissory estoppel: (1) a clear promise; (2) reliance on the promise; (3) substantial detriment; and (4) damages. *Toscano v. Greene Music*, (2004) 124 Cal. App. 4th 685, 692. Defendants contend that

Plaintiff failed to allege the first element of promissory estoppel -- that there was a clear promise. (See Defendants' Motion, 7:1-7).

Specifically, Defendants cite to *Mora v. U.S. Bank N.A.* wherein the court dismissed the plaintiff's claim for promissory estoppel because it found that the plaintiff made only a "conclusory allegation about an unspecified individual agreeing to a loan modification with unspecified terms at some point in the unspecified future." 2012 WL 2061629 (N.D. Cal. June 7, 2012); (See Defendants' Motion, 7:8-24). The facts of *Mora*, however, substantially differ from the facts presented here. In *Mora*, the plaintiff failed to allege who made the promise claiming only that it was someone on behalf of the defendant. *Id.* Further, the plaintiff was not certain of exactly what was promised -- whether the defendant promised to agree to a permanent loan modification or whether it was only to review their application for a loan modification. *Id.* As such, the court concluded that there was no clear promise and dismissed the claim for promissory estoppel.

Plaintiff, however, has sufficiently pleaded the element of a clear promise as Plaintiff identified who made the promise and described the terms of the promise in the SAC.^{1 2}

Paragraphs 38 and 39 of the SAC, therefore, allege that the named Defendants made a promise to Plaintiff. Defendants contend that it is not enough to allege generally that all Defendants made the promise but provides no support for its assertion. Further, paragraphs 38 and 39 of the SAC explain the clear terms of the promise -- that if Plaintiff financially contributed to the Family's pooled resources, she would be given an equal share of Family's assets upon her retirement which would allow her to care for her future, including her medical and retirement needs. It is unclear, therefore, why Defendants contend that Plaintiff failed to allege the first element of promissory estoppel. It seems apparent from the allegations in the SAC that a clear promise by Defendants was made to Plaintiff, which related to her financial security once her investment matured.

B. Plaintiff's SAC Alleges Facts Sufficient to State a Claim for Unjust Enrichment

Unjust enrichment is the "receipt of a benefit and [the] unjust retention of the benefit at the expense of another." *Lectrodryer v. SeoulBank*, (2000) 77 Cal. App. 4th, 723, 726. Despite Defendants' unsupported contention to the contrary, a claim for unjust enrichment need not be plead with specificity. Defendants claim, however, that Plaintiff failed to state a plausible unjust enrichment claim because the SAC does not allege the exact amount of money Plaintiff gave to Defendants. (See Defendants' Motion, 9:1-12). No such allegation is required, however. It is clear from even a cursory review of the SAC that Plaintiff stated sufficient facts to substantiate a claim for unjust enrichment.

Paragraph 50 and 52 of the SAC clearly alleges the first element for an unjust enrichment claim which is that Defendants received a benefit from Plaintiff.³ And Paragraph 50 and 54 of the SAC further alleges that Defendants unjustly retained the benefit given by Plaintiff at Plaintiff's detriment.⁴

Defendants argue that as a member of the Family, Plaintiff "enjoyed mutually beneficial financial and emotional support with Family members at the time she allegedly contributed financially." (See Defendants' Motion, 9:13-17). First, Plaintiff's SAC is entirely dedicated to explaining the torturous circumstances Plaintiff endured for over thirty-three years as a result of Defendants' violent, abusive, and humiliating conduct. And Plaintiff clearly alleged in paragraphs 50 and 54, listed above, that she received no benefit from Defendants. Second, it is entirely irrelevant whether or not Defendant claims Plaintiff "enjoyed mutually beneficial financial and emotional support". This is a point of contention and is a fact in dispute. *It is obvious, therefore, that Defendants have no basis for attacking Plaintiff's pleading and have instead resorted to disputing the evidence, which is entirely inappropriate on a motion to dismiss.* Plaintiff plead sufficient facts to support her claim for unjust enrichment and Defendants' assertions to the contrary are simply false and entirely unsupported. In the event this Court is inclined to entertain Defendants' argument that a specific dollar amount must be alleged, Plaintiff requests leave to amend the SAC to state such facts.

C. Plaintiff's SAC Alleges Sufficient Facts to State a Claim for Fraud

To prevail on a fraud claim, a Plaintiff must establish the following elements: (1) that the defendant made a material misrepresentation; (2) there was knowledge of falsity; (3) defendant intended to defraud or induce reliance; (4) plaintiff actually and justifiably relied on the misrepresentation; (5) and damages. *Lazar v. Super. Ct.*, (1996) 12 Cal. 4th 631, 638; *Hackethal v. Nat'l Cas. Co.*, (1987) 189 Cal. App. 3d 1102, 1111. Pursuant to [Federal Rule of Civil Procedure, Rule 9\(b\)](#), fraud must be plead with particularity so as to give notice to the defendants of the specific fraudulent conduct against which they must defend.

Defendants wrongfully assert that Plaintiff's fraud claim lacks specificity. (See Defendants' Motion, 11:6-7). In particular, Defendants contend that the SAC lacks facts relating to the “who, what, when, where, and how”. (See Defendants' Motion, 11:12-14). First, paragraph 75 of the SAC clearly alleges **who** made the representations, **when** the representations took place, and **where** the representations were made.⁵ As such, Plaintiff sufficiently plead that the representations were made by all named Defendants and that the representations were made on or about the beginning of 1970 in New York. Paragraph 76 further specifies the content of the misrepresentations effectively establishing the “what” and “how” specificity requirements for pleading a fraud claim.⁶

Despite the above cited language, Defendants argue that the SAC fails to state what misrepresentations Defendants' made with any specificity. Clearly, such a contention has no basis. Because Defendants take no issue with the remaining elements for fraud, Plaintiff's claim was sufficiently plead. Even if this Court is inclined to grant Defendants' motion, however, Plaintiff requests an opportunity to amend the SAC to allege additional facts relating to the specificity of the misrepresentations as more details could easily be asserted relating to the names of each Defendant making the misrepresentations as well as the locations and dates of such communications.

D. Plaintiff's SAC Alleges Sufficient Facts to State a Claim for Breach of Fiduciary Relationship

Three elements must be met to establish a claim for breach of fiduciary relationship: (1) a fiduciary relationship must exist; (2) the defendant must have breached the duty; and (3) damages. *Charnay v. Cobert*, (2006) 145 Cal. App. 4th, 170, 182. Defendants' only contention is that the SAC fails to allege the existence of a fiduciary relationship. As grounds for its assertion, Defendants contend that merely placing trust in another person does not create a fiduciary relationship. (See Defendants' Motion, 13:17-26). While this may be true, Defendants fail to address Plaintiff's allegation that a fiduciary relationship was created through the existence of a joint venture. The SAC clearly alleges that a joint venture was created and that a fiduciary relationship existed via this joint venture agreement.⁷

Further, the elements for breach of fiduciary duty need not be plead with specificity as Defendant wrongfully asserts. As such, Plaintiff's claim for breach of fiduciary relationship was sufficiently plead in the SAC.

E. Plaintiff's SAC Alleges Sufficient Facts to State a Claim for Constructive Fraud

A claim for constructive fraud must include the following elements and must be plead with specificity similar to a fraud claim: (1) a fiduciary or confidential relationship; (2) an act, omission, or concealment involving a breach of that duty; (3) reliance; and (4) damages. *Cal. Civ. Code § 1573*; *Dealertrack, Inc. v. Huber*, (C.D. Cal. 2006) 460 F. Supp. 2d 1177, 1183.

Defendant simply repeats the same argument asserted for Plaintiff's fraud claim and argues that Plaintiff's claim for constructive fraud is improperly plead because the misrepresentation element was not plead with specificity. As mentioned above, however, Plaintiff alleged the required elements of who, what, when, where, and how. Accordingly, Plaintiff's claim for constructive fraud was well-plead.

F. Plaintiff's SAC Alleges Sufficient Facts to State a Claim for Conversion

A claim for conversion of tangible personal property includes the following elements: (1) the plaintiff must have a right to possession/ownership of the tangible personal property at the time of the conversion; (2) the defendants must have actually and substantially interfered with the plaintiff's right; and (3) the plaintiff suffered damages. *Messerall v. Fulwider*, (1988) 199 Cal. App. 3d 1324, 1329.

Defendants cite to *McKell v. Washington Mutual, Inc.*, for the proposition that “money cannot be the subject of a cause of action for conversion unless there is a specific, identifiable sum involved . . .” (2006) 142 Cal. App. 4th 1457, 1491. And Defendants contend that Plaintiff's claim for conversion fails because the SAC fails to identify the exact sum of money on which Plaintiff bases her claim. While it is true that money cannot be the subject of a cause of action for conversion unless there is a specific, identifiable sum involved, “it is not necessary that each coin or bill be earmarked.” *Haigler v. Donnelly*, (1941) 18 Cal. 2d 674, 681. As such, Defendants analysis of the elements for conversion is read too narrowly. Further, in *McKell*, the court dismissed the plaintiff's claim for conversion because the defendants were not even in possession or holding the plaintiff's payments. 142 Cal. App. 4th at 1491. Here, Plaintiff sufficiently described the sources of funds she gave to Defendants.

The SAC, therefore, sufficiently states and identifies the source of funds Defendants converted, namely, Plaintiff's employment income and money inherited from her parents. As mentioned above, Plaintiff is not required to identify the exact dollar amount converted by Defendants. If this Court, however, is inclined to grant Defendants' motion on this claim, Plaintiff asks that she be given an opportunity to amend the SAC as she could easily allege a dollar range to reflect the amount of her inheritance, employment income, and other **finances** which Defendants converted.

G. Plaintiff's SAC Alleges Sufficient Facts to State a Claim for **Financial Elder Abuse**

Civil law defines **elder financial abuse** as when a person or entity does any of the following: “(1) takes, secretes, appropriates, obtains, or retains real or personal property of an **elder** for a wrongful use or with intent to defraud, or both; (2) Assists in taking, secreting, appropriating, obtaining, or retaining real or personal property of an **elder** for a wrongful use or with intent to defraud, or both; or (3) takes, secretes, appropriates, obtains, or retains, or assists in taking, secreting, appropriating, obtaining, or retaining, real or personal property of an **elder** by undue influence.” *Cal. Welf. & Inst. Code §15610.30*. Furthermore, an **elder** is defined as a person residing in California who is sixty-five years of age or older. *Cal. Welf. & Inst. Code §15610.27*.

Defendants allege that Plaintiff failed to plead how she is an **elder** as she was only fifty-six years old in 2003. (See Defendants' Motion, 17:12-20). As thoroughly discussed above, however, the statute did not begin to run until 2012, when Plaintiff reached the age of retirement. In 2012, Plaintiff was sixty-five years old and Defendants still had not paid Plaintiff the monies promised although in 2003 they told Plaintiff that she would be paid once her investment matures. Defendants also allege that Plaintiff is not an **elder** because she is now a resident of Oregon and the code requires that she be a resident of California. The SAC, however, clearly alleges that “A substantial part of the events, acts or omissions which give rise to the claims asserted herein or the harms resulting there from **occurred in the County of Los Angeles, State of California.**” Emphasis added; (SAC, ¶12). As such, Plaintiff is an **elder** pursuant to the code. If this Court is inclined to grant Defendants' motion, however, Plaintiff asks that it be given leave to amend to allege the Oregon statute relating to **financial elder abuse**, namely Oregon Revised Statute Chapter 124.

Defendants further contend that failure to pay Plaintiff her rightfully owed money does not constitute **elder abuse** because such conduct is not reckless, oppressive, fraudulent, or malicious conduct as required by *California Welfare and Institutions Code section 15657*. This requirement, however, relates only to instances of physical **elder abuse**. See *Cal. Welf. & Inst. Code §15657* (the code section applies to a defendant who is liable for physical **abuse** as defined in Section 15610.63, or neglect as defined in Section 15610.57, neither of which include **financial elder abuse**). As such, Plaintiff is not required to show reckless, oppressive, fraudulent or malicious conduct but rather is only required to meet the elements described above. Even

if Plaintiff was required, however, to allege that Defendants engaged in reckless, oppressive, fraudulent or reckless conduct, she successfully has done so. The SAC is nearly entirely dedicated to allegations relating to Defendants' fraud and oppressive conduct. Defendant has clearly delayed payment to Plaintiff only to play on her vulnerable and susceptible psychological state. As such, Plaintiff's claim for **financial elder abuse** has been sufficiently plead.

H. Plaintiff's SAC Alleges Sufficient Facts to State a Claim for Intentional Infliction of Emotional Distress

A claim for intentional infliction of emotional distress ("IIED") must contain the following elements: (1) extreme or outrageous conduct by the defendant; (2) intent to cause or reckless disregard of the probability of causing emotional distress; (3) severe emotional distress suffered by plaintiff; and (4) actual and proximate causation of the emotional distress. *Bogard v. Empls Casualty Co.*, (1985) 164 Cal. App. 3d 602, 616. Extreme and outrageous conduct is defined as conduct that is "so extreme in degree as to go beyond all possible bounds of decency and to be regarded as atrocious and utterly intolerable in a civilized society." *Cochran v. Cochran*, (1998) 65 Cal. App. 4th 488, 496.

Defendants claim that Plaintiff did not allege facts specific to Sadhana Temple, Defendants Aschner, Carson or Thompson and therefore failed to allege the first element for IIED relating to these Defendants. (See Defendants' Motion, 19:23-24). Defendants, however, are entirely mistaken as the SAC specifically identifies the outrageous conduct undertaken by all the named Defendants, both collectively and individually.⁸

It is clear, from the above, that Plaintiff alleged facts to establish the first element on IIED as to all Defendants.

I. Plaintiff's SAC Alleges Sufficient Facts to State a Claim for Involuntary Dissolution of Joint Venture

California Corporations Code section 16101(9) defines a partnership as "an association of two or more persons to carry on as co-owners a business for profit." And whether a partnership has been created can be inferred from the conduct of the parties involved. *Weiner v. Fleischman*, (1991) 54 Cal. 3d 476, 482-83. The primary feature of a partnership is that there is an "association of two or more persons for the purpose of carrying on a business together." *Auditorium Co. v. Barsotti*, (1919) 40 Cal. App. 592, 596.

Despite Defendants' contention to the contrary, the SAC sufficiently pleads the necessary elements for an involuntary dissolution of joint venture claim.⁹

Despite the above allegations, Defendants contend that the Family is not a partnership or joint venture because it never intended to operate as a business for profit and only provided emotional support sharing common spiritual and religious beliefs. (See Defendants' Motion, 21:18-20). Again, Defendants argument is improper on a motion to dismiss. Defendants are clearly arguing the evidence rather than the pleadings. Whether the members of the Family carried on a business is clearly an issue in dispute. There can be no dispute, however, that the claim was properly alleged. Certainly, the above cited allegations raise sufficient inferences for a court to draw a reasonable inference that Defendants are liable for the alleged misconduct. This is all that is needed for Plaintiff to plead a factually plausible claim. *Iqbal*, 556 U.S. at 678. As such, Defendants' assertions have no merit.

J. Plaintiff's SAC Alleges Sufficient Facts to State a Claim for Accounting

Defendants' last contention is that Plaintiff failed to state a claim for accounting. When the rights and duties of partners "are not spelled out in an express agreement, the law imposes obligations arising out of the nature of their fiduciary relationship. One of these is the duty to account, as provided in *Corporations Code* sections 15021 and 15022." *Manok v. Fishman*, (1973) 31 Cal. App. 3d 208, 213.

As thoroughly discussed above, Plaintiff has sufficiently alleged that the Family constitutes a partnership. Thus, Plaintiff is entitled to an accounting of the entire business. Thus, Plaintiff's claim for accounting was properly alleged in the SAC and Defendants' contention to the contrary is simply meritless.

VI.

DEFENDANTS' MOTION TO DISMISS IMPROPERLY ADDRESSES THE EVIDENCE RATHER THAN THE PLEADINGS AND MUST BE DENIED

Defendants' motion attacks the evidence rather than the pleadings. Arguments relating to the evidence are inappropriate in a motion to dismiss as allegations in the complaint must be taken as true. In deciding a motion for failure to state a claim pursuant to *Federal Rules of Civil Procedure*, Rule 12(b)(6), the Court must accept the pleaded facts as true and view them in the light most favorable to the Plaintiff. *Hospital Bldg. Co. v. Rex Hospital Trustees*, (1976) 425 U.S. 738, 740; *Parks School of Business, Inc. v. Symington*, 51 F. 3d 1480, 1484 (9th Cir. 1995); *Jenkins v. McKeithen*, 395 U.S. 411, 421, reh'g denied, 396 U.S. 869 (1969).

Further, a motion to dismiss only tests the sufficiency of the pleading and evaluates whether the allegations sufficiently place Defendants on notice of its alleged misconduct. *Iqbal*, 556 U.S. at 678. A plaintiff is not required to set out in detail the facts upon which he bases his claim . . . only a short and plain statement of the claim is required. *Dioguardi*, 139 F.2d at 774. Defendants' arguments relating to the evidence, therefore, must not be entertained by this Court.

VII.

IN THE EVENT THE COURT FEELS MORE FACTS NEED TO BE ALLEGED, AN AMENDMENT MUST BE ALLOWED

Plaintiff maintains that she has sufficiently plead each cause of action, as discussed above, and Defendants' motion must be denied. Plaintiff's SAC sets forth the circumstances and communications surrounding her claims. Taken as a whole, the SAC sufficiently places Defendants on notice of their alleged misconduct. If, however, the Court feels more facts need to be alleged, Plaintiff requests that leave to amend be granted so as to give Plaintiff an opportunity to cure the remaining defects, if any.

Generally, leave to amend should be granted unless the complaint shows that it is incapable of amendment. *Greenberg v. Equitable Life Assurance Society*, (1973) 34 Cal App. 3d 994, 998. In California, there is a history of liberality in permitting amendments to pleadings at any and all stages of the proceeding, up through and including conforming to proof at trial. Great liberality should be exercised in permitting amendments to pleadings at all stages of the proceeding. *Redondo Improv. Co. v. Redondo Beach*, (1934) 3 Cal. App. 2d. 299; *Rockey Mountain Export Co. v. Colquit*, (1960) 179 Cal. App. 2d. 204; *Nelson v. Specialty Records, Inc.*, (1970, 2d Dist.) 11 Cal. App. 3d. 126; *Myer v. State Board of Equalization*, (1954) 42 Cal 2d. 376. Given the complexity of the case and the volume of the claims alleged, Plaintiff respectfully requests that if the Court feels inclined to grant Defendants' motion to dismiss, it allow for leave to amend.

VIII.

CONCLUSION

For the foregoing reasons, Plaintiff, Karen Leitner, respectfully requests that this Court deny Defendants' motion in its entirety, or, in the alternative, grant Plaintiff leave to file an amendment to the operative pleading.

Respectfully submitted.

DATED: May 27, 2014

Law Office of Richard M. Foster

By: <<signature>>

Richard M. Foster, Esq.

Katherine Domenico, Esq.

Attorneys for Plaintiff

Footnotes

- 1 **Upon the date of maturing**, on or about November 27, 2012, **LEITNER demanded equal share of the joint venture assets** for her retirement as previously promised for all the work and investment of her time, money, income and inheritance for 33 years. DEFENDANTS have not kept their promise of giving LEITNER's equal share of her investment, her retirement funds, and have till the date of filing this complaint denied her any portion of the joint funds owed to LEITNER, while at the same time setting up retirement accounts and other accounts in their personal names and also, controlling funds for their personal use and purchase of properties." Emphasis added; (SAC, ¶39).
- 2 **"Upon the date of maturing**, on or about November 27, 2012, **LEITNER demanded equal share of the joint venture assets** for her retirement as previously promised for all the work and investment of her time, money, income and inheritance for 33 years. DEFENDANTS have not kept their promise of giving LEITNER's equal share of her investment, her retirement funds, and have till the date of filing this complaint denied her any portion of the joint funds owed to LEITNER, while at the same time setting up retirement accounts and other accounts in their personal names and also, controlling funds for their personal use and purchase of properties." Emphasis added; (SAC, ¶39).
- 3 "For thirty-three years (33 years), the prime of LEITNER'S life, DEFENDANTS, the FAMILY and TEMPLE exclusively controlled LEITNER'S life, **taking all her earnings, her inheritance from her father and later the inheritance from her mother.** The last twelve years of her time with FAMILY, KUMAR would not let LEITNER work outside the FAMILY/TEMPLE and required LEITNER to work for him exclusively. **KUMAR reaped the benefits of LEITNER'S life time earnings, inheritance money and her time and labor, at the expense of LEITNER'S finances and youth.**" Emphasis added; (SAC, ¶50). "The temple fraudulently extracted donations of money, time and energy from Plaintiff under the pretense that such donations were being made for nonprofit charitable or tax-exempt purposes, when in fact such donations were used for profit-driven, non-charitable, non-tax exempt purposes." (SAC, ¶52). "DEFENDANTS have control and access to all the checking accounts and real property, including LEITNER'S inheritance money, income, and retirement funds. DEFENDANTS have denied access to LEITNER and have refused to give her rightfully owed retirement money. Defendants have therefore been unjustly enriched, having retained and received the benefit of LEITNER'S earnings, income, inheritance, time, labor, and interest on all the checking and savings accounts, without paying adequate restitution." Emphasis added; (SAC, ¶54).
- 4 **"LEITNER at no time benefited from DEFENDANTS conduct**, and on the other hand, **was injured financially, physically, mentally, emotionally, and psychologically.**" Emphasis added; (SAC, ¶50).
- 5 **"On or about the beginning of 1970**, PLAINTIFF met DEFENDANTS in New York. Among many other things, DEFENDANTS made lucrative representations and promises to PLAINTIFF on order to induce PLAINTIFF to join Defendants organization." Emphasis added; (SAC, ¶75).
- 6 **"DEFENDANTS promised and represented to PLAINTIFF** that upon joining their joint venture, **PLAINTIFF would be provided with financial security, privacy, health, living, food, spiritual comfort.** DEFENDANTS also promised and represented to PLAINTIFF that her **earnings, income, time, and labor would be pooled into joint accounts held by members of the FAMILY and TEMPLE, whereby each member, like PLAINTIFF, would have an equal share of the combined pooled resources.** PLAINTIFF was promised and assured that **if she became part of this joint venture, PLAINTIFF'S future would be taken care of, including all her necessities to live, medical needs, housing, survival, retirement, all upon dates of maturing.**" Emphasis added; (SAC, ¶76).
- 7 **"PLAINTIFF and DEFENDANTS entered into a joint venture** whereby PLAINTIFF **entrusted her financial and personal matters** into DEFENDANTS, who represented to PLAINTIFF that it would be for her benefit." Emphasis added; (SAC, ¶92). "DEFENDANT

KUMAR took this most personal and **financial** information as described above and **promised and assured** LEITNER that her information would remain **confidential** amongst DEFENDANTS, the FAMILY, and the TEMPLE.” Emphasis added; (SAC, ¶93).

8 “DEFENDANTS with intent to cause serious emotional distress or with reckless disregard to the same, **utilized mind games, physical abuse, verbal harassment, drugs, sex, rape, emotional torture, psychological manipulations, and other methods to control LEITNER**. LEITNER was made promises where she relied on those promises by DEFENDANTS that she would be given everything that she needed, would be loved, and **financially** secure. DEFENDANTS would then turn against her and demand through the above described methods to control LEITNER to make her work for the FAMILY, DEFENDANTS, and TEMPLE, providing all her income and earnings to the FAMILY, TEMPLE and DEFENDANTS, including her inheritance from her parents. **DEFENDANTS using Machiavellian Tactics, Marquis de Sade methods physiologically and psychologically conditioned LEITNER and extorted her earned and inherited money** for their own benefit and gain.” Emphasis added; (SAC, ¶125). “LEITNER experienced the **abusive** tactics as described above. **She was beaten by sticks and cattle prods, at times left without food to the point of starvation, not given a bed or blanket to sleep on, berated to the point that she was fearful of everyone** and lacked an ability to trust others or to think and act for herself.” Emphasis added; (SAC, ¶126). “Additional example of **DEFENDANTS outrageous conduct** includes by their **refusal to give LEITNER her retirement and inheritance money, and all monies rightfully owed to her, by enforcing a dominion control of her account**, whereby positions DEFENDANTS in a position to obtain complete control and power over PLAINTIFF’S interests.” Emphasis added; (SAC, ¶130). “**DEFENDANTS are refusing to provide LEITNER her rightfully earned and invested funds**. As an **elder**, DEFENDANTS have caused and continued to cause LEITNER’S injuries sustained through the thirty-three (33) years and upon the date of maturity for retirement.” Emphasis added; (SAC, ¶131).

9 “PLAINTIFF and DEFENDANTS **jointly entered into a relationship to carry out a joint interest in common business** which was for the **financial** security of all FAMILY members, which included PLAINTIFF.” Emphasis added; (SAC, ¶140). “PLAINTIFF and DEFENDANTS had the understanding that they **were to share profits and losses** throughout this joint venture. Throughout the joint venture, all FAMILY members, which included PLAINTIFF and DEFENDANTS, **shared joint checking accounts, certificates of deposits, real estate, expenses for food and housing**. The acts by PLAINTIFF and DEFENDANTS demonstrated a mutual understanding amongst all parties.” Emphasis added; (SAC, ¶141). “As testified at her deposition, DEFENDANT CARSON **testified that all FAMILY members, which included PLAINTIFF, had access to the checking accounts as the monies in those accounts were pooled from all FAMILY members** for the benefit of all FAMILY members. DEFENDANT CARSON also testified that over **30 various checking accounts were created to ensure retirement for all FAMILY members**, which included PLAINTIFF.” Emphasis added; (SAC, ¶142).